In the

Supreme Court of the United States

October Term, 1976

No. 76- 996

LOUIS J. POMPONIO, JR.,

Petitioner,

–against–

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Louis J. Pomponio, Jr., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming his conviction of conspiracy to violate 18 U.S.C. §1952 and of two substantive violations of that statute.

Opinions Below

The opinion of the court of appeals (App. A, 1a–2a)[1] is unreported. The district court issued no opinion. A prior opinion of the court of appeals in this case (App. B, 3a–9a) reversing a district court order of arrest of judgment is reported at 511 F.2d 953. The district court issued no written opinion in support of its prior order of arrest of judgment.

1. References to "a" are to pages in the appendix portion of the petition, *infra.*

Jurisdiction

The judgment of the court of appeals (App. C, 10a) was entered on November 19, 1976. On December 9, 1976, Chief Justice Burger extended the time for filing a petition for writ of certiorari to and including January 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Constitutional Provision and Statutes Involved

The Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. §1952:

> §1952. Interstate and foreign travel or transportation in aid of racketeering enterprises
>
> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to –
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
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> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall

> be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.
>
> (c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C. §215:

> §215. Receipt of commissions or gifts for procuring loans
>
> Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check, or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

New York Penal Law §180.00:

§180.00 Commercial bribing

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

Commercial bribing is a class B misdemeanor.

Questions Presented

1. May one be convicted under the Travel Act, 18 U.S.C. §1952, for travelling in or using the facilities of interstate commerce to facilitate or carry out the state crime of "commercial bribing," as that crime is defined by New York State Penal Law Article 180?

2. May one be convicted under the Travel Act for travelling in or using the facilities of interstate commerce with the intent to pay a commission or gift to an officer or director of a bank for procuring a loan, when the receipt of such commission or gift by such officer or director would be in violation of 18 U.S.C. §215?

3. Was petitioner denied a fair trial because of the extensive prejudicial publicity prior to the trial and the district court's failure to conduct a full and searching *voir dire* of potential jurors?

Statement

Petitioner was indicted, with three others, upon a single count of conspiracy to violate the Travel Act, 18 U.S.C. §1952, and upon various counts alleging substantive violations of that statute. The charges stemmed from payments allegedly made by the defendants to Sidney Zneimer, a vice-president of the Royal National Bank in New York City, for the purpose of influencing his conduct with respect to loans made by the bank to corporations owned or controlled by the defendants. The indictment, tracking the words of the statute, charged that the defendants travelled from Virginia to New York "with the intent to promote, manage, carry on, and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crime of bribery, in violation of the laws of the State of New York (New York Penal Law Article 180) and of the United States (Title 18, United States Code, Section 215)."

Prior to trial, petitioner filed two motions requesting a change of venue because of prejudicial publicity in the Alexandria, Virginia area in which the trial was to take place. Both motions were denied (A.2, A.28, A.29, A.215–A.218).[2] Petitioner then requested the court to propound a series of *voir dire* questions designed to inquire into the effect of the extensive publicity. He further requested that the veniremen be examined individually out of each other's presence. Both requests were denied (A.219–A.227, A.21).

Petitioner was tried separately from his three co-defendants due to his hospitalization prior to the date of their trial.[3] After the jury returned a guilty verdict, District Judge Albert V. Bryan, Jr. granted a motion for arrest of judgment, holding, in a brief oral statement, that neither 18 U.S.C. §215 nor the New York commercial "bribing" statute (N.Y. Penal Law §180) are encompassed within the Travel Act's definition of "unlawful activity."

The court of appeals reversed the order of arrest of judgment (App. B, *infra*). It held that the term "bribery" as used in the Travel Act's definition of "unlawful activity" was not limited to bribery of public officials, but extended "into areas of private [commercial] conduct" (7a). The court conceded that historically the crime of bribery was "limited to cases involving the corruption of those in the public service" (*id.*), and that portions of the legislative history of the Travel Act "appear to support the position of the defendants" that the Act be limited to

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2. References to "A." are to pages in the Joint Appendix filed with the court of appeals, copies of which will be lodged with the Court upon request.

3. Two co-defendants, Peter and Paul Pomponio – petitioner's brothers – were acquitted, and one co-defendant, Charles J. Piluso, was convicted.

the original historical definition (*id*). Nevertheless, claiming reliance upon this Court's opinion in *United States* v. *Nardello*, 393 U.S. 286, the court of appeals held that the limitation urged by petitioner would be an "unnaturally narrow reading" of the statute (8a).[4] The case was remanded to the district court for entry of judgment. A petition for certiorari was denied. 423 U.S. 874.

Following entry of judgment and imposition of sentence, petitioner appealed. Among the several points raised on appeal, petitioner requested the court of appeals to reconsider its construction of the Travel Act in the light of the subsequent contrary holding in *United States* v. *Brecht*, 540 F.2d 45 (2d Cir. 1976). In that case, the Second Circuit explicitly refused to follow the Fourth Circuit's decision in this case and held that violation of the New York State commercial "bribing" statute was not an "unlawful activity" within the meaning of the Travel Act. Like the Fourth Circuit, the Second Circuit justified its contrary decision on its reading of *United States* v. *Nardello, supra.*

The Fourth Circuit considered the views of the *Brecht* court, but adhered to its earlier decision in this case that the Travel Act encompasses violations of the New York commercial bribing statute and 18 U.S.C. §215 (2a). It further held that the trial court's failure to conduct a full *voir dire* in light of the extensive pretrial publicity was not error, at least without more specific suggestions of possible *voir dire* questions by trial counsel (2a).

Reasons For Granting the Writ

1. This case presents a clear and unequivocal conflict between two circuit courts of appeals on an important question of statutory construction affecting the administration of criminal justice in the United States. The conflict was recognized explic-

4. The court of appeals failed to decide the issues raised by the indictment's reference to 18 U.S.C. §215 – whether it was a "bribery" statute altogether and how it could be applied against a payor, when it in terms referred solely to "receipt" – asserting that the reference to it in the indictment served "only as a background identification of the unlawful activities" (9a).

itly both by the Second Circuit, which declined to follow the Fourth Circuit's original decision in *Pomponio*, 540 F.2d at 48, and by the Fourth Circuit, which refused to alter its original decision in light of the Second Circuit's holding in *Brecht, supra* (2a). Resolution of the conflict by this court is particularly appropriate because each circuit court purported to find the basis for its holding in the decision of this Court in *Nardello, supra.*

The question presented is one that has arisen with some frequency in recent years and which evoked considerable judicial disagreement even before the recent conflicting appellate decisions. See *United States* v. *Niedleman*, 356 F. Supp. 979, 981 (S.D.N.Y. 1973), and cases cited therein. Moreover, the question touches upon the sensitive interplay between the respective roles of the federal and state governments in the enforcement of the criminal laws, a matter about which the Court has expressed considerable concern in recent years. Cf. *Younger* v. *Harris*, 401 U.S. 37.

The Travel Act effected an unusual expansion of federal jurisdiction in criminal law enforcement, in reaction to a particular and compelling national concern: the influence and spread of organized crime. It was enacted in response to then Attorney General Kennedy's request for a package of legislation to enable the Justice Department to act effectively in that area. *Hearings on S. 1653-1658, S. 1665 Before the Senate Committee on the Judiciary*, 87th Cong. 1st Sess. 1-7, 16-17 (1961). The primary target of the Act was gambling, and acts related to or arising from gambling. *Id.* at 2, 16-17.

By incorporating violation of specified state criminal laws as an element, the Travel Act inevitably affects the delicate and historic federal-state balance in law enforcement.

> Given the ease with which citizens of our Nation are able to travel and the existence of many multi-state metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation are patronized by out of state customers. . . . [A]n expansive Travel Act

> would alter sensitive federal-state relations, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies.

Rewis v. *United States,* 401 U.S. 808, 812.

While Congress possesses broad but not unlimited power to effect such a result, the Court has made clear that a drastic restructuring of the federal and state roles should not be assumed lightly. See *United States* v. *Bass,* 404 U.S. 336, 349; *Rewis* v. *United States, supra.* The Act must be construed as narrowly as possible without undermining its fundamental purpose: to control the national problem of "organized crime" and organized criminals, whose *modus operandi* often is to "reside in one State while operating or managing illegal activities located in another." *Rewis* v. *United States, supra,* 401 U.S. at 811. Thus, especially with respect to crimes not usually connected with typical "organized crime" activities, only where "Congress conveys its purpose clearly, [will it] be deemed to have significantly changed" the balance of federal-state criminal jurisdiction. *United States* v. *Bass, supra,* 404 U.S. at 349. See also *Erlenbaugh* v. *United States,* 409 U.S. 239, 247 n.21.

The holding of the court of appeals in the present case tips the balance decidedly in favor of federal intervention in areas of traditional state concern. It creates a federal felony out of acts bearing no particular relevance to the compelling national law enforcement interest, embodied in the Travel Act, of protection against and control of organized crime.[5] It imposes a potential

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5. While this national interest clearly would be furthered by inclusion within the scope of the statute of acts of traditional bribery – *i.e.*, "corrupt activities by public officials," *United States* v. *Nardello, supra,* 396 U.S. at 293 n. 11 – it would not be served significantly by inclusion of commercial bribery. As the Second Circuit recognized, commercial "bribery," unlike bribery of public officials, "typically is not a feature of organized crime," but rather "is typically an establishment transgression." *Brecht, supra,* 540 F.2d at 50.

penalty of five years imprisonment and a $10,000 fine for an offense which at the time of the enactment of the Travel Act was not even a state crime in thirty-seven states,[6] and which today remains a minor misdemeanor in most state jurisdictions, including New York.[7] There is no indication in either the language or the legislative history of the Act that Congress intended such a sweeping result; indeed the Fourth Circuit suggested that the legislative history points the other way.[8]

Despite the important policies of federalism and the pull of the legislative history which militate in favor of a narrow construction of the Travel Act, the court of appeals held that its construction of the Act was compelled by the Court's decision in *United States* v. *Nardello, supra.* The court of appeals' conclusion can not withstand close analysis.

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6. See Note, *Control of Non-governmental Corruption by Criminal Legislation,* 108 U. Pa. L. Rev. 949, 864, 866 (1960) (chart).

7. New York classifies "commercial bribing" as a Class B misdemeanor carrying a maximum sentence of three months imprisonment. In contrast, New York's crime of "bribery," which is defined as conferring a benefit upon a public official, is a Class D felony carrying a maximum sentence of seven years imprisonment. N. Y. Penal Law §§200.00, 70.00(2)(d).

8. Throughout the legislative process, the recurring references to "bribery" appear in conjunction with "official corruption," particularly by organized crime figures. Attorney General Robert Kennedy described the Act as covering "the bribery of local officials," 107 Cong. Rec. 8580-8581, and "bribery and corruption of local officials." *Hearings on S.1653-8 and S. 1665 Before the Senate Committee on the Judiciary ("Hearings")* 87th Cong. 1st Sess. (1961), at 11. When the House of Representatives proposed an amendment to the bill which would have limited the coverage of the bill to extortion and bribery related to the specified crimes of gambling, liquor, narcotics, or prostitution, Deputy Attorney General Byron R. White wrote in protest to the House Judiciary Committee that the amendment "removes from the purview of the bill the bribery of state, local and federal officials by the organized criminals unless we can prove that the bribery is directly attributable to [the four specified crimes.]" See *Nardello, supra,* 393 U.S. at 292 n. 9. See also *Hearings, supra,* at 11, 13, 17, 108, and *passim.*

Nardello was indicted for travelling in interstate commerce to commit the "unlawful activity" of "extortion" in violation of the Pennsylvania law against blackmail of a private individual. He argued first that since Pennsylvania law defined a separate crime of "extortion" – which was limited to acts *by* a public official – he could not be convicted under the Travel Act as charged. Alternatively he argued that the Travel Act's inclusion of "extortion" as an "unlawful activity" was limited, as it was at common law, to acts *by* public officials.

The Court rejected both arguments. It held that a state's label of a crime is not determinative of whether or not it comes within the categories of "unlawful activities" specified by the Travel Act. Rather it is a matter of federal law whether a particular state offense – however labelled – was meant to be included within the Travel Act's scope. Second, the Court found that blackmail of and/or by private individuals was just the kind of crime that the Travel Act was intended to reach: it was carried out by the use of force, fear, or threats and was a common tool of organized crime operating on a national level. 393 U.S. at 295. The Court found that both the language and the legislative history of the Act required rejection of Nardello's argument that the Act was intended to make criminal only the "extortionate" acts of public officials.

The Fourth Circuit failed to engage in a similar analysis of the purposes of the Travel Act in applying it to the New York commercial "bribery" statute. It merely quoted that portion of this Court's opinion rejecting Nardello's argument as "unnaturally narrow" because it would limit "extortion" violations of the Travel Act to acts by public officials, while the Travel Act refers to acts by any person. But no such "unnatural" limitation flows from the construction of the Act petitioner urges in this case. Pursuant to that construction, the Act can reach any person who commits or attempts to commit bribery; the act of bribery, however, is defined as conferring a benefit upon a public official in an effort to influence his official conduct. This, indeed, was the apparent understanding of the scope of the "bribery" portion of the Travel Act shared by the govern-

ment and the Court in *Nardello*. See 393 U.S. at 292 n. 9, 293 n. 11.

The holding of the *Brecht* court accurately reflects the concerns and analysis expressed in *Nardello*. Certainly New York's decision to label the acts defined by Penal Law Article 180 as commercial "bribery" is no more determinative here than was Pennsylvania's failure to label the private acts of blackmail at issue in *Nardello* as "extortion." What is required is analysis of the scope and nature of the state crime in light of the purpose of the Travel Act of controlling organized crime on a nationwide basis and in light of the important policy of preserving the balance of federalism in the enforcement of the criminal laws. This is what the Second Circuit did in *Brecht* and what the Fourth Circuit failed to do in the present case.

This is one of the rare cases which fits all the criteria for the granting of certiorari. It is in the interest not only of petitioner, but of the government as well, that the court resolve the conflict in the circuits on this "important question of statutory construction," *Shapiro* v. *United States*, 335 U.S. 1, 4. Certiorari should be granted to resolve that conflict and to restore the critical balance in federal-state relations distorted by the holding of the court of appeals in this case.

2. The court of appeals' affirmance of the conviction on the theory of petitioner's alleged facilitation of the bank officer's violation of 18 U.S.C. §215 (9a) affects a drastic revision of the statutory scheme contrary to the congressional intent, and conflicts with decisions of this Court and of federal circuit and district courts.

(a) Petitioner was convicted pursuant to an indictment charging interstate travel with the intent to promote, manage, or carry on the unlawful activity of commercial "bribery" in violation not only of New York State Penal Law Article 180, but also of 18 U.S.C. §215.[9]

9. Since both grounds were charged and the jury returned a general verdict of guilty, the conviction must be reversed if the indictment was

Section 215 provides federal misdemeanor penalties for a bank officer or director who receives gifts or commissions for procuring or endeavoring to procure a bank loan or related advantage from a bank. By its terms, section 215 is a commercial graft or commercial "bribery" statute. Accordingly, it no more comes within the scope of the "unlawful activities" reachable by the Travel Act than does the New York "commercial bribing" statute.

Indeed, the anomaly that would be created by elevating the New York misdemeanor statute into a federal felony through the Travel Act is even more pronounced with respect to section 215. If Congress wished to make violation of section 215 a felony, it certainly would have done so. It is illogical that Congress intended that a bank officer who violates section 215 by acts wholly within New York be subject to a maximum federal sentence of one year imprisonment and a $5,000 fine, while the same officer who makes a phone call or travels to Connecticut or New Jersey to facilitate an identical violation of section 215 be subject to five years imprisonment and a $10,000 fine.[10] Nothing makes it clearer that Congress intended the Travel Act to reach only bribery of public officials, a felony under state and federal law.

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faulty in charging either ground as an "unlawful activity" within the meaning of the Travel Act. "[T]he proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates* v. *United States*, 354 U.S. 298, 312.

10. The anomaly is compounded by the fact that petitioner was convicted of one count of conspiracy to violate the Travel Act. The conspiracy statute, 18 U.S.C. §371, provides that the penalty for its violation shall not exceed the penalty provided in the substantive statute to which the conspiracy is directed. If petitioner had been charged with conspiracy to violate section 215, he would have been subject only to the misdemeanor penalties of that statute. By charging conspiracy to violate the Travel Act, the government was able to overcome the limitations of section 371 and obtain a felony conviction. It is inconceivable that Congress intended such extraordinary and inexplicable results.

(b) Even if it were assumed that a violation of section 215 constituted an unlawful activity as defined by the Travel Act, the conduct of petitioner could not in any event be a violation of that provision. As we have noted, section 215 makes unlawful the *receipt* of gifts or commissions; the payment of such gifts or commissions is not made a criminal act by section 215 or any other related provision of federal law. This result was intentional;[11] if Congress meant to make the act of *giving* a crime, it would have done so explicitly, as it did in other statutes.[12] Thus the court of appeals' holding creates a second anomaly: it imposes federal criminal liability for the act of interstate travel to perform an underlying act which Congress intentionally failed to make criminal in the first place.

The government attempted to justify the indictment in the court of appeals by arguing that one who provides gifts or commissions to a bank officer may be found guilty as an aider or abettor under 18 U.S.C. §2, and that therefore petitioner's conviction under the Travel Act of "facilitating" Zneimer's alleged violation of section 215 is not anomalous. But it is questionable at best whether the general aiding and abetting or conspiracy statutes are available to the government to prosecute the persons whose acts would be necessary for the completion of the underlying crime, but whose acts are not made criminal themselves.

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11. The legislative history of the Banking Act from which section 215 is derived makes this clear: "In this section it is sought . . . to end the illegitimate practice whereby officers of national banks have heretofore profited at the expense of borrowers by charging a commission or brokerage for the obtaining of loans." *House of Representatives Report No. 69*, 63rd Cong. 1st Sess. 72 (1913).

12. Section 215 is one of twelve sections in Chapter 11, Title 18 of the United States Code relating to the receipt of things of value to influence the actions of the recipients. Nine proscribe the act of giving as well as the act of receiving (18 U.S.C. §§201, 203, 209-214, 216); one proscribes giving only (18 U.S.C. §224); and two proscribe receiving only (18 U.S.C. §§215, 217).

See *A.L.I. Model Penal Code*, Section 2.06(3), (6);[13] *Gebardi v. United States*, 287 U.S. 112; *Nigro* v. *United States*, 117 F.2d 624 (8th Cir. 1941); *Lott* v. *United States*, 205 F. 28 (9th Cir. 1913); *United States* v. *Bowles*, 183 F. Supp. 237 (D. Me. 1958).

Concededly there is some support for the approach suggested by the government below in *United States* v. *Kenner*, 354 F.2d 780 (2d Cir. 1965), *cert. denied*, 383 U.S. 958, and *May* v. *United States*, 175 F.2d 994 (D.C. Cir. 1949), *cert. denied*, 338 U.S. 830.[14] But *May* was decided by a divided court over a vigorous dissent and was specifically and expressly rejected in *United States* v. *Bowles*, *supra*. And the validity of *Kenner* was seriously questioned in *United States* v. *Barash*, 412 F.2d 26, 37 (2d Cir. 1969) (concurring opinion), *cert. denied*, 396 U.S. 832, in which Judge Friendly (joined by Judge Feinberg), citing the Model Penal Code (see n. 13, *supra*) indicated that he "would have considerable difficulty in believing that [one] who makes a payment can properly be convicted for aiding and abetting [the recipient]."

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13. The ALI Model Penal Code, which uses the term "accomplice" to encompass aiding and abetting, §2.06(3), says in §2.06(6):

> Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:
>
> (b) the offense is so defined that his conduct is inevitably incident to its commission; * * *

14. In *Kenner* the court held that defendants who had paid bribes to Internal Revenue Service employees could be aiders and abettors with respect to the violation of a provision which makes it unlawful for Internal Revenue Service employees to accept illegal compensation. In *May* the court held that defendants who paid bribes to a Congressman could be aiders and abettors with respect to the violation of a statute prohibiting Members of Congress from receiving compensation affecting the Government.

Here, unlike *Kenner* and *May*, petitioner was charged with aiding and abetting violation not of the statute specifically proscribing the receipt of payments or gifts, but rather of the Travel Act (A.6, A.23, A.27). Yet there is no factual allegation or proof that petitioner aided or abetted Zneimer to travel in interstate commerce in violation of section 1952. The only "travelling" alleged was that of petitioner and his co-defendants.

Accordingly, even if section 215 is deemed to be an "unlawful activity" within the meaning of the Travel Act, *certiorari* should be granted to resolve the question of whether one may be convicted under the Travel Act for "facilitating" another's violation of section 215 by offering a gift or commission to a bank officer. Resolution of the question will settle the conflict among the lower federal courts on the proper approach to be taken in such contexts, and will restore rational order to the congressional scheme.

3. The court of appeals' approval of the district court's wholly inadequate conduct of the *voir dire* of the prospective jury, in light of the extensive and prejudicial local pretrial publicity, is contrary to the approach followed by other district courts and courts of appeals and required by this Court. *Certiorari* should be granted to resolve the conflict and, most importantly, to establish firm guidelines to be followed by the lower courts in "what has become a most troublesome question in administration of justice." *Linkletter* v. *Walker*, 381 U.S. 618, 620.

(a) The publicity preceding the trial of this case was extensive, both in terms of scope and length of time, and was unequivocally prejudicial to petitioner.

Petitioner was indicted on September 24, 1973. For a full year preceding the indictment, the news media serving the area in which he lived, worked and was to stand trial had generated massive publicity about back tax difficulties petitioner was encountering as a result of an extensive Internal Revenue Service audit.[15] At the time the publicity first commenced, the Pomponio name was already well known in the Northern Virginia commu-

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15. The several counties from which jurors are summoned for service in the United States District Court for the Eastern District of Virginia, Alexandria Division, are geographically proximate to Washington, D.C. These communities, collectively known as "Northern Virginia," receive considerable coverage from Washington based media, such as the Washington Post and Washington Star-News newspapers (whose daily circulation for Northern Virginia was 160,000 and 110,000, respectively), the Wash-

nity. The petitioner and his two brothers were major office building and real estate developers whose construction of 17 highrise buildings in the Arlington, Virginia area changed land-use, traffic patterns, and the aesthetic environment. The Pomponios were an important and controversial force in the economic life of the area, as employers, landlords, and borrowers from banks. On the political and community level, they had disagreements with zoning boards, planning commissions, citizens' groups and government agencies, some of which were their lessees.

The adverse publicity which preceded petitioner's indictment was merely a harbinger of what was to come. The indictment in this case was one of six against petitioner and his associates handed down by a special grand jury between September 24 and November 14, 1973. The indictments resulted in six trials between December 1973 and April 1974 of which the trial in the present case was the last. In the seven month interval between petitioner's indictment and trial, stories of his legal and financial problems appeared in the press on an almost daily basis and also received extensive coverage on the radio. The articles, accompanied by bold headlines, typically appeared on the first page of the "Metro" section of the Washington Post and the Washington Star-News, and on the front page of the Arlington Journal and Northern Virginia Sun.[16]

Several phrases and themes were repeated throughout the extensive accounts of the Pomponios' travails. The words "empire" and "conglomerate" were consistently used to describe the Pomponio corporate structure (A.44, A.58, A.60 – A.62, A.76).

ington affiliates of CBS, NBC and ABC television, and assorted radio stations. The widespread circulation in Northern Virginia of the two daily Washington newspapers effectively qualifies them as "local papers" along with the Arlington Journal and the Northern Virginia Sun (whose daily circulation was nearly 30,000 and 20,000, respectively.)

16. A number of these articles as well as others appended to subsequent change of venue motions are set forth in the Joint Appendix in the court of appeals (A.30 – A.163). Petitioner's motions also referred to comprehensive radio coverage of the same subject matter (A.211 – A.212).

Stories about particular indictments or trials invariably referred to all past, present or anticipated future investigations, indictments and trials of the Pomponio family (A.90, A.104, A.141, A.149, A.152, A.154). The headlines and articles were replete with accusations of bribery, fraud, tax evasion, diversion of funds, tax delinquency, loan defaults and bankruptcy, allegedly resulting in considerable financial loss to banks, individual businessmen, and local state and federal governments (A.90, A.101, A.107, A.108, A.118, A.138, A.150).[17]

(b) In light of the extensive publicity, of which the above account gives only a hint,[18] the district court's conduct of the *voir dire* was hopelessly inadequate.

In addressing the venire panel, the court asked the potential jurors en masse:

> There has been some publicity concerning cases or charges involving persons with the same name as the Defendant, and perhaps the Defendant.
>
> Have any of you read or heard anything about those cases (A.236)?

Each juror who acknowledged that he had heard or read anything about the cases stood and gave his name. The court then asked that juror, in the presence of the others:

> Has what you have read or heard about the other cases rendered you in your opinion in a position where you would be unable to give this defendant a fair and just verdict (A.237)?

17. In the midst of the hostile publicity a survey of prospective jurors in the Alexandria Division in October, 1973, commissioned by the defense and conducted by a recognized expert, found that 32% of those interviewed associated the name Pomponio with the words "shady" and "deceitful" (A.179).

18. See also *United States* v. *Pomponio*, 517 F.2d 460 (4th Cir. 1975), in which the court of appeals reversed petitioner's conviction in a related case because of the trial judge's failure to inquire about the effects upon the unsequestered jury of prejudicial publicity which arose during trial.

If the juror answered affirmatively, he was excused. If he answered negatively, the court did not interrogate him further and he was allowed to remain on the panel.[19] In questioning the jurors in this manner the court rejected petitioner's request that each juror who indicated that he heard or read about the defendant in this case, or about cases involving petitioner's brothers or Charles Piluso, be questioned about the nature and extent of his knowledge (A.219 – A.220).

The extent of the publicity in this case and its effect on the veniremen is amply demonstrated by their responses to the court's questions. Twenty-three out of the venire panel of thirty-seven, including eight of the actual jurors, admitted having heard or read about the cases and several veniremen

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19. An example of the brief, almost casual, colloquy between the court and the jurors on this subject is the following:

The Court: Mr. Walker, has what you have read about other cases affected you so that you would be unable to render a fair and just and impartial verdict insofar as this case is concerned?

Mr. Walker: No.

The Court: What is your name, ma'am?

Ms. Ramey: Joan Ramey.

The Court: Has what you have heard or read about the other cases affected your ability to be an impartial juror insofar as this case is concerned, in your opinion?

Ms. Ramey: No, your Honor.

The Court: All right.

Mr. Schluntz: My name is Larry Schluntz.

The Court: Has what you have read or heard concerning the other cases affected your ability to be an impartial juror in this case, in your opinion, sir?

Mr. Schluntz: No, your Honor (A.238).

conceded their inability to try the case impartially.[20] Despite this fact, the court below made no effort to explore the extent or depth of each juror's exposure to the publicity. It simply confined its inquiry to one simple question in which each juror was asked to assess his own impartiality.

(c) As the Court recently noted, "[t]he problems presented by this case are almost as old as the Republic." *Nebraska Press Ass'n.* v. *Stuart,* — U.S. —, 96 S. Ct. 2791, 2797. In recent years, the problems have become more common and have presented a serious threat to the administration of justice, due to the expansion and proliferation of instant media coverage of "sensational" events, including criminal trials. This Court has endeavored in a series of decisions to delineate the conduct that a district court should follow to assure a defendant a fair trial while preserving the rights of the press and the public. See *Sheppard* v. *Maxwell,* 384 U.S. 333, 357-362; *Rideau* v. *Louisiana,* 373 U.S. 723; *Irvin* v. *Dowd,* 366 U.S. 717; *Nebraska Press Ass'n* v. *Stuart, supra.* Those decisions suggest that the most important mechanism which should be followed is a searching *voir dire* in which the impact of the publicity upon prospective jurors can be investigated and considered on an individual basis. Only by conducting such a *voir dire* can the district judge determine whether a fair trial is possible at the time and place scheduled, or whether additional protections, such as a change of venue or a continuance, are necessary.

In response to the concerns expressed by the Court, the American Bar Association has adopted standards to govern the procedure a trial court should follow in jury *voir dire:*

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20. The number of jurors who, based on exposure to the publicity, had already formed an opinion about the case was most likely higher than those admitting as much. "It is too much to expect of human nature that a juror would volunteer, in open court, before his fellow jurors, that he would be influenced in his verdict by a newspaper story of a trial." *Coppedge* v. *United States,* 272 F.2d 504, 508 (D.C. Cir. 1959), *cert. den.,* 368 U.S. 855. See Broeder, *Voir Dire Examination: An Empirical Study,* 38 So.Cal.L.Rev. 503, 506, 510-513 (1965).

(A) Method of examination.

Whenever there is believed to be a significant possibility that individual talesmen will be ineligible to serve because of exposure to *potentially prejudicial material*, the examination of each juror with respect to his exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept, by court reporter or tape recorder whenever possible. The questioning shall be conducted for the purpose of *determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial*, not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have.

ABA Standards Relating to Fair Trial and Free Press §3.4 (Approved Draft 1968) (emphasis added).

Despite the Court's emphasis on the importance of a full *voir dire*, most recently in the *Nebraska Press Ass'n.* case, and despite the proposed standards of the ABA, questions continue to arise as to the proper scope and nature of the inquiry to be made of prospective jurors. Numerous cases have been decided in which the district courts have struggled with the problem, sometimes satisfactorily, sometimes not.[21] A number of circuit courts have accepted the ABA standards as the minimum necessary to protect the rights of a defendant.[22]

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21. See and compare *United States* v. *Addonizio*, 313 F. Supp. 486 (D.N.J. 1970), *aff'd.*, 451 F.2d 49, 65 (3d Cir. 1971), *cert. den.*, 405 U.S. 936; *United States* v. *Lewin*, 467 F.2d 1132, 1137 (7th Cir. 1972); *United States* v. *Dellinger*, 472 F.2d 340, 367 (7th Cir. 1972), *cert. den.*, 410 U.S. 970; *United States ex rel. Bloeth* v. *Denno*, 313 F.2d 364 (2d Cir. 1963), *cert. den.*, 372 U.S. 978; *United States* v. *Chapin*, 515 F.2d 1274, 1289 (D.C. Cir. 1975), *cert. den.*, — U.S. —, 96 S. Ct. 449.

22. *United States* v. *Liddy*, 509 F.2d 428 (D.C. Cir. 1975) (*en banc*); *United States* v. *Bryant*, 471 F.2d 1040 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1112; *United States* v. *Addonizio*, *supra*, 451 F.2d at 67; *Patriarca* v. *United States*, 402 F.2d 314, 318 (1st Cir. 1968), *cert. denied*, 393 U.S. 1022; *Silverthorne* v. *United States*, 400 F.2d 627 (9th Cir. 1968).

The approach of the district court in this case, as affirmed by the court of appeals, is in obvious conflict with the ABA standards and the decisions adopting those standards. Indeed, the district court hardly can be said to have struggled with the problem at all. There was no probing, no searching examination. The district judge only asked one question and that was calculated to evoke a response totally "subjective in nature – jurors were called upon to assess their own impartiality for the court's benefit" – a wholly inadequate approach to ascertain prejudice. *Silverthorne* v. *United States*, *supra*, 400 F.2d at 638.[23] The court of appeals' approval of this approach is contrary even to its own decision in *Smith v. United States*, 262 F.2d 50 (4th Cir. 1958), in which it reversed a conviction because of insufficient *voir dire* examination and recognized the inadequacy of a solitary and general question addressed to the venire panel in which each panel member was asked if he was "sensible to any bias or prejudice" he might have. Other courts of appeals also have reversed convictions where the *voir dire* required jurors to assess their own impartiality.[24]

The district court compounded its error by refusing the petitioner's request (A.219, A.200) that each juror be questioned out of the presence of the other jurors. A juror may have been sincere in declaring that he would be impartial "but the psychological impact requiring such a declaration before one's fellows is often its father." *Irvin* v. *Dowd*, 366 U.S. 717, 728. Where there is a possibility that jurors have been exposed to

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23. Even when two jurors answered "I don't believe so" (A.239, A.241) and one juror answered "I don't think so" (A.242) to the question of whether they would be unable to render an impartial verdict, thus indicating less than complete conviction, the district court did not pursue the matter.

24. *United States* v. *Lewin*, *supra*, 472 F.2d at 1137; *United States* v. *Dellinger*, *supra*, 472 F.2d at 375; *United States ex rel. Bloeth* v. *Denno*, *supra*. See *Marshall* v. *United States*, 360 U.S. 310; *United States* v. *Concepcion Cueto*, 515 F.2d 160 (1st Cir. 1975); *United States* v. *Haldeman*, No. 75-1381 (D.C. Cir. October 12, 1976), slip op. at 40 n. 51 ("We agree that it would have been reversible error for the court to accept jurors simply because they said they would be fair").

prejudicial material the court should examine each juror apart from the other jurors. *Patriarca* v. *United States, supra,* 402 F. 2d at 318.

If criminal defendants are to be accorded a truly fair and impartial jury, then trial courts are obligated to take positive steps to ensure that the effects of pretrial publicity on potential jurors be limited. The failure of the district court to do so in the circumstances of this case highlights the need for a more definitive and detailed statement from this Court on the proper scope and conduct of the *voir dire.* The Court should grant *certiorari* to insure the fair administration of criminal justice.

(d) The court of appeals held that the district court was not required to ask further and more detailed questions at *voir dire* because of trial counsel's failure to request them. This simply was not the case. Trial counsel propounded a lengthy list of questions for *voir dire*, including detailed questions designed to ferret out the impact of pretrial publicity.[25] The proposed questions included requests that the questions be asked of each potential juror separately and not before the other veniremen.

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25. In particular, the following line of questioning was proposed:

1. This Defendant has received considerable publicity in newspapers, radio and television concerning their business activities and other matters. Have any of you read about or heard about the Defendant or any case in which he is or has been involved? For those who respond affirmatively, additional questioning *in camera* should seek to determine what was read or heard and whether it would be possible to eliminate such information and to consider the case solely on the evidence presented during the trial. Each such person should further be asked whether he understands that he may not allow anything he may have read or heard to influence or affect him in any way in his consideration of the evidence and the question of a verdict in this case (A.219).

* * *

4. Have any of you ever heard or read about any case in which Peter and Paul Pomponio, the brothers of the Defendant, and Charles J. Piluso, his counsel, may have been involved? For those who respond affirmatively, additional questioning should seek to determine whether such case may have involved the Defendant in any way. If so, further questioning *in camera* should seek to determine what was read or heard and whether it would be possible to eliminate such information and to consider the case solely on the evidence presented during the trial. Each of such persons should further be asked whether they understand that they may not allow anything they may have read or heard to influence them or affect them in any way in their consideration of the evidence and the return of the verdict in this case (A.220).

Several minutes after the proposed questions were submitted, the district court denied the motion for *in camera voir dire* and asked the limited questions with respect to publicity that we have noted. The fact that trial counsel did not renew his request for more detailed *in camera* questioning of the potential jurors – when the original request had just been denied – can hardly be considered to be a waiver of such important rights. Moreover, the obligation to protect the constitutional rights of the defendant lay as well with the district court, which had a "major responsibility" to eliminate the effects of prejudicial publicity. *Nebraska Press Assn.* v. *Stuart, supra,* 96 S. Ct. at 2800. Surely defense counsel was not required to ask the court two or three times to carry out its responsibilities.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January, 1977

APPENDIX A

United States Court of Appeals

For the Fourth Circuit

No. 75-2287

UNITED STATES OF AMERICA,

Appellee,

versus

LOUIS J. POMPONIO, JR.,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued September 17, 1976. Decided November 19, 1976.

Before HAYNSWORTH, Chief Judge, and WINTER and BUTZNER, Circuit Judges.

Victor Rabinowitz (Leonard B. Boudin, Dorian Bowman, Michael Hertzberg, Rabinowitz, Boudin and Standard on brief) for Appellant; Frank W. Dunham, Jr., Assistant United States Attorney (William B. Cummings, United States Attorney on brief) for Appellee.

PER CURIAM:

We see no reversible error in the conviction of Louis J. Pomponio, Jr., of conspiracy to violate 18 U.S.C. § 1952 and two substantive violations of that statute.

It is true that the voir dire of prospective jurors was limited, but the district court gave counsel ample opportunity to suggest additional questions and counsel declined to request them. There was not proof of such pervasive prejudice and prejudicial publicity in the jurisdiction in which the trial was conducted to require more extensive voir dire on the district court's own motion, or to require that the trial be transferred. Indeed, in a separate, earlier trial Pomponio's co-defendants were acquitted.

We do not think that the district court abused its discretion in declining to limit the scope of the cross-examination of defendant, and its instructions to the jury were unexceptionable. Defendant's argument that the indictment failed to charge an offense under the laws of the United States was rejected in United States v. Pomponio, 511 F.2d 953 (4 Cir.), cert. denied, 423 U.S. 874 (1975), and, notwithstanding a contrary conclusion in United States v. Brecht, 540 F.2d 45 (2 Cir. 1976), we rest on our prior decision. That case also rejected *sub silentio* defendant's claim that the evidence presented to the grand jury was improperly obtained.

After this case was submitted, defendant filed a motion to remand the case "for the limited purpose of allowing the defendant to apply to the District Court for a hearing on whether the life of the grand jury which indicted the defendant had expired prior to the return of the said indictment." Presumably defendant seeks to contest the district court's jurisdiction on the authority of United States v. Fein, 504 F.2d 1170 (2 Cir. 1974). Defendant's motion does not make clear whether defendant seeks a remand in lieu of a decision on the merits of the other contentions raised on appeal. We prefer to decide the latter now since they have been briefed, argued and submitted. Our affirmance, however, should not be construed as passing on the merits of the underlying contention sought to be raised by the motion, nor to foreclose the district court's considering the contention if it concludes that it is otherwise authorized so to do.

AFFIRMED.

APPENDIX B

Opinion

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 74-1667

UNITED STATES OF AMERICA, *Appellant*,

v.

LOUIS POMPONIO, *Appellee*.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., District Judge.

No. 74-1668

UNITED STATES OF AMERICA, *Appellee*,

v.

CHARLES J. PILUSO, *Appellant*.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

Argued October 4, 1974 Decided February 7, 1975

Before BUTZNER, RUSSELL and FIELD, Circuit Judges.

Frank W. Dunham, Jr., Assistant United States Attorney, (David H. Hopkins, United States Attorney, on brief) for Appellant in No. 74-1667; Alan Y. Cole (Lee A. Schutzman & Cole and Groner on brief) for Appellee in No. 74-

1667; Albert J. Ahern, Jr. for Appellant in No. 74-1668; Thomas K. Moore, Assisant United States Attorney, (Brian P. Gettings, United States Attorney, on brief) for Appellee in No. 74-1668.

FIELD, Circuit Judge:

The principal question on these appeals is the sufficiency of an indictment returned by a grand jury in the Eastern District of Virginia aganist Louis J. Pomponio, Jr., along with his brothers, Peter and Paul Pomponio, and their attorney, Charles J. Piluso, charging them with violating and conspiring to violate the Travel Act, 18 U.S.C. § 1952.[1]

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[1] 18 U.S.C.

§1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury. As amended Pub. L. 91-513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.

The charges in the indictment stemmed from payments totaling over $300,000 allegedly made by the defendants to Sidney M. Zneimer, a Vice President of the Royal National Bank in New York City, for the purpose of influencing his conduct relative to a number of loans made by the bank to corporations owned or controlled by the Pomponios.

The indictment tracks the language of the statute charging that the defendants "did willfully travel from the State of Virginia to the State of New York, with the intent to promote, manage, carry on, and facilitate the promoting, managing, establishing and carrying on of an unlawful activity, said unlawful activity being the crime of bribery, in violation of the laws of the State of New York (New York Penal Law Article 180)[2] and of the United States Title 18, United States Code, Section 215);[3] the said unlawful activity relating to the efforts of LOUIS J. POMPONIO, JR., CHARLES J. PILUSO and PAUL POMPONIO to influence Sidney M. Zneimer in the performance of his duties at the

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[2] § 180.00. Commercial bribing

A person is guilty of commercial bribing when he confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs.

Commercial bribing is a class B misdemeanor.

[3] § 215. Receipt of commissions or gifts for procuring loans.

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, of a Federal intermediate credit bank, or of a National Agricultural Credit Corporation, except as provided by law, stipulates for or receives or consents or agrees to receive any fee, commission, gift, or thing of value, from any person, firm, or corporation, for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan or extension or renewal of loan or substitution of security, or the purchase or discount or acceptance of any paper, note, draft, check or bill of exchange by any such bank or corporation, shall be fined not more than $5,000 or imprisoned not more than one year or both.

Royal National Bank by giving the said Sidney M. Zneimer checks, as detailed in the table below * * *."[4]

Prior to trial the defendants filed a motion to dismiss the indictment on the ground that neither commercial bribery under the New York statute nor the receipt of commissions or gifts by a bank official proscribed by section 215 of the federal code constitute "unlawful activity" within the purview of section 1952. Judge Oren R. Lewis declined to grant the motion and set the case for trial. However, Louis J. Pomponio, Jr., was hospitalized because of illness and the trial proceeded against the other three defendants. The court granted a motion for judgment of acquittal of Peter Pomponio and the jury returned a verdict of not guilty with respect to his brother Paul. Charles J. Piluso was found guilty on all three counts and has appealed his conviction in Case No. 74-1668. Thereafter, Louis J. Pomponio, Jr. was tried before Judge Albert V. Bryan, Jr., and was found guilty by the jury. During the course of this trial, Pomponio's counsel challenged the sufficiency of the indictment in a motion for judgment of acquittal. Judge Bryan, understandably, felt bound by the earlier ruling of Judge Lewis and denied the motion. However, Judge Bryan granted Pomponio's post-trial motion for arrest of judgment, holding that "Section 215 of Title 18 of the U. S. Code and the New York Penal Code, in my view do not come within the unlawful activity definition of Section 1952 of Title 18." The government has appealed this action in Case No. 74-1667.[5]

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[4] Although the indictment contained one conspiracy count under 18 U.S.C. § 371 and eight substantive counts, the government proceeded to trial on the conspiracy count and only two of the substantive counts, Counts Nos. V and IX. The quoted language is from Count No. V of the indictment, but charging language to the same effect was employed in the con-piracy count as well as Count No. IX.

[5] The motion in arrest of judgment was granted pursuant to Rule 34, Fed. R. Cr. P., and is appealable under 18 U.S.C. § 3731. *See* Esposito v. United States, 492 2d 6 (7 Cir. 1974).

Primarily, the defendants contend that the word "bribery" as used in the Travel Act is intended to mean bribery in the classic sense of the common law which was limited to the corruption of public officials in the administration of their public trust and does not extend to such conduct by private individuals. Concededly, the crime of bribery was originally limited to cases involving the corruption of those in the public service,[6] and some statements in the limited legislative history of the Act might appear to support the position of the defendants.[7] However, while the states and the federal government have enacted statutes dealing wih the corruption of public officials, they have also extended the concept of bribery into areas of private conduct which we think appropriately fall within the ambit of the Travel Act.[8] "There can be no question but that any crime of bribery involves moral turpitude."[9] and we discern no reason why the Congress, in using the term "bribery," intended that it be limited to the corruption of public officials.[10] We find the answer to this contention of the defendants in *United States* v. *Nardello*, 393 U.S. 286,

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[6] *See* 3 Wharton's Criminal Law and Procedure, §§ 1380, et seq., (R. Anderson Ed. 1957).

[7] See Hearing on S. 1654-58, S. 1665 Before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961).

[8] *See, e.g.*, 18 U.S.C. §§ 201, 203, 210, 211 and 214; N.Y. Penal Law §§ 200.00 and 200.10 (McKinney 1973), bribery of a public servant and bribe receiving by a public servant; N.Y. Penal Law §§ 180.15 and 180.25 (McKinney 1967), bribery of a labor official and bribe receiving by a labor official; N.Y. Penal Law §§ 180.40 and 180.45 (McKinney 1967), sports bribing and sports bribe receiving.

[9] United States v. Esperdy, 285 F.2d 341, 342 (2 Cir. 1961).

[10] In the Southern District of New York one judge has reached the conclusion that commercial bribery under the New York statute does not fall within section 1952. United States v. Niedelman, 356 F.Supp. 979 (1973). However, he acknowledges that "[s]imilar contentions have heretofore been considered and rejected in this District [in four other decisions]." *Id.* at 981.

292-293 (1969), where a similar argument with respect to the meaning of the word "extortion" in the Act was urged upon the Court. In rejecting this argument the Court stated:

> "Appellees suggest, however, that Congress intended that the common-law meaning of extortion—corrupt acts by a public official—be retained. If Congress so intended, then § 1952 would cover extortionate acts only when the extortionist was also a public official. Not only would such a construction conflict with the congressional desire to curb the activities of organized crime rather than merely organized criminals who were also public officials, but also § 1952 imposes penalties upon any individual crossing state lines or using interstate facilities for any of the statutorily enumerated offenses. The language of the Travel Act, 'whoever, crosses state lines or uses interstate facilities, includes private persons as well as public officials."

Paraphrasing the language of the Court in *Nardello*, "[i]n light of the scope of the congressional purpose we decline to give the term [bribery] an unnaturally narrow reading • • • and thus conclude that the acts for which [defendants] have been indicted fall within the generic term [bribery] as used in the Travel Act." 393 U.S. at 296.

The defendants further contend that since 18 U.S.C. § 215 criminalizes only the act of the bank officer who receives the proscribed thing of value, they as payors could not be convicted of an offense under that statute [11] and, accordingly, it was improperly designated as an "unlawful activity" in the indictment.[12] As pointed out in *United States* v.

[11] Incident to this contention, counsel in their arguments and briefs discussed at some length the dichotomy with respect to the question of whether the payor can be convicted as an aider and abettor under a statute such as 18 U.S.C. § 215. *See* United States v. Kenner, 354 F2d 789 (2 Cir. 1965); United States v. Bowles, 183 F.Supp. 237 (D.C. Me. 1958); *cf.* May v. United States, 175 F.2d 994 (D.C. Cir. 1949); *see also* United States v. Johnson, 337 F.2d 180 (4 Cir. 1964).

[12] Defendants take the position that if either the New York commercial bribery law or the federal statute was improperly included in the indictment, the indictment must fall. In view of our disposition of the case, we find it unnecessary to reach this point.

Wechsler, 392 F.2d 344 (4 Cir. 1968), the fallacy in such an argument lies in a too heavy reliance on the role played by section 215 in the indictment, and elides the fact that it serves "only as a background identification of the unlawful activities." [13] The "unlawful activity" specified in the Act may be bribery under either state or federal law and reference to such law is necessary only to identify the type of "unlawful activity" in which the defendants intended to engage. Proof that the unlawful objective was accomplished or that the referenced law has actually been violated is not a necessary element of the offense defined in section 1952. *See United States* v. *Rizzo*, 418 F.2d 71 (7 Cir. 1969); *McIntosh* v. *United States*, 385 F.2d 274 (8 Cir. 1967). Accordingly, we find it sufficient that the indictment charged the defendants with interstate travel with the intent, *inter alia*, to facilitate the violation of the federal statute by Zneimer. Finally, the defendants argue that our construction of the Act improperly escalates these underlying misdemeanors to federal felonies, but such a contention has been summarily rejected by the courts. *United States* v. *Karigiannis*, 430 F.2d 148 (7 Cir. 1970); *United States* v. *Brennan*, 394 F.2d 151 (2 Cir. 1968).

We have considered the other points raised on Piluso's appeal and find no reversible error. Accordingly, the conviction in No. 74-1668 is affirmed. The order of the district court granting Pomponio's motion in arrest of judgment in No. 74-1667 is reversed, and the case is remanded for further proceedings consistent with this opinion.

AFFIRMED IN CASE No. 74-1668.

REVERSED AND REMANDED IN CASE No. 74-1667.

[13] 392 F.2d at 346.

APPENDIX C

JUDGMENT

United States Court of Appeals

for the

Fourth Circuit

No. 75-2287

United States of America,

Appellee,

versus

Louis J. Pomponio, Jr.,

Appellant.

Appeal from the United States District Court for the EASTERN District of VIRGINIA.

This cause came on to be heard on the record from the United States District Court for the EASTERN District of VIRGINIA, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

FILED

NOV 19 1976

U. S. COURT OF APPEALS
FOURTH CIRCUIT

William K. Slate II
CLERK